Deputy Chief Police Officer, Perak & Anor v Ramesh a/l Thangaraju

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–01–60 OF 1997

GOPAL SRI RAM, DENIS ONG AND HAIDAR JJCA

27 NOVEMBER 2000

Administrative Law *— Rules of natural justice — Procedural fairness — Disciplinary proceedings — Proceedings taken under Police (Conduct and Discipline) (Junior Police Officers and Constables Regulations) 1970 — Allegation of breach of orderly room procedure — Statement of witness used in proceedings — Opportunity to cross examine witnesses — Whether wrongfully dismissed*

Administrative Law *— Rules of natural justice — Disciplinary proceedings — Proceedings taken under Police (Conduct and Discipline) (Junior Police Officers and Constables Regulations) 1970 — Allegation of breach of orderly room procedure — Statement of witness used in proceedings — Opportunity to cross examine witnesses — Whether wrongfully dismissed*

Disciplinary proceedings were instituted against the respondent, a police officer, for accepting a bribe from one Shanmugam. The incident had been witnessed by two officers of the Anti Corruption Agency ('the ACA officers'), who were called as witnesses at the inquiry. Shanmugam and another witness, Detective Kamaruddin, had died in the meantime. The respondent was represented by a police officer and was given the opportunity to cross examine the witnesses throughout the disciplinary proceedings. Shanmugam's statement was not used, but Detective Kamaruddin's statement was read out. The respondent was found guilty and dismissed from the police force. The judge found for the respondent as there had been a breach of the rules governing the orderly room procedure. The respondent's dismissal was struck down as being void due to the use of statements by deceased witnesses, ie Detective Kamaruddin's statement. The appellant appealed.

Held, allowing the appeal with costs:

(1) The respondent had the benefit of a full inquiry, at which he was represented by an officer. The most material witnesses, namely the ACA officers who witnessed the incident in question, gave their evidence in his presence. He was given the opportunity to cross examine them. So far as Detective Kamaruddin's statement was concerned, the reading of it into the proceedings did not produce any procedural unfairness since the respondent was given the opportunity to contradict it. It transpires from the evidence that he did not choose that course (see p 167E–F).

(2) It is clear from the respondent's pleaded case and the arguments presented before the learned judge that the substantive merits of the decision were never challenged. It was not the respondent's

case that the decision to dismiss him was unreasonable. His complaint was limited to procedural fairness. No material was therefore placed before the judge by way of evidence to show that the tribunal here had acted unreasonably in arriving at its decision. The respondent did, in all circumstances of the case, receive procedural fairness (see p 167F–H).

[**Bahasa Malaysia summary**

Prosiding disiplin dikenakan ke atas responden, seorang pegawai polis, kerana menerima rasuah dari seorang bernama Shanmugam. Kejadian itu disaksi oleh dua orang pegawai dari Badan Pencegah Rasuah ('pegawai-pegawai BPR tersebut'), yang dipanggil sebagai saksi ketika siasatan itu. Shanmugam dan seorang saksi yang lain, Detektif Kamaruddin, telah meninggal dunia sementara itu. Responden diwakili seorang pegawai polis dan diberi peluang memeriksa balas saksi-saksi sepanjang prosiding disiplin tersebut. Pernyataan Shanmugam tidak digunakan, tetapi pernyataan Detektif Kamarudin dibacakan. Responden didapati bersalah dan dilucutkan dari angkatan polis. Hakim menyebelahi responden kerana terdapatnya pelanggaran peraturan mengenai prosedur tatatertib mahkamah. Pelucutan responden dibatalkan sebagai tidak sah disebabkan kegunaan pernyataan saksi yang telah meninggal, iaitu pernyataan Detektif Kamaruddin. Perayu telah merayu.

Diputuskan, membenarkan rayuan tersebut dengan kos:

(1) Responden mendapat faedah siasatan penuh di mana beliau diwakili seorang pegawai polis. Saksi-saksi utama, iaitu pegawai-pegawai BPR tersebut yang telah menyaksikan kejadian tersebut, memberi keterangan dalam kehadiran responden. Beliau diberi peluang memeriksa balas mereka. Berkenaan pernyataan Detektif Kamaruddin, pembacaannya semasa prosiding tidak mengakibatkan apa-apa ketidakadilan prosedur kerana responden diberi peluang menyangkalnya. Dapat dilihat daripada keterangan bahawa beliau tidak membuat pilihan tersebut (lihat ms 167E–F).

(2) Adalah jelas daripada kes yang dirayu oleh responden dan hujahan yang dikemukakan di hadapan hakim yang arif bahawa merit substantif keputusan tersebut tidak dipertikaikan. Bukan kes responden bahawa keputusan melucutkan kedudukannya itu tidak wajar. Aduannya cuma terhad kepada keadilan prosedur. Tiada material dikemukakan di hadapan hakim dari segi keterangan untuk menunjukkan bahawa tribunal tersebut telah bertindak secara tidak wajar dalam mencapai keputusannya. Responden, dalam semua keadaan kes tersebut, mendapat keadilan prosedur (lihat ms 167F–H).]

Notes

For cases on disciplinary proceedings, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 580–586.

For a case on procedural fairness, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) para 606.

Cases referred to

Abdul Raub v The Attorney General [1983] 1 MLJ 10 (refd)

Government of Malaysia v Loh Wai Kong [1979] 2 MLJ 33 (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan [1996] 1 MLJ 481 (refd)

Phang Moh Shin v Commissioner of Police [1967] 2 MLJ 186 (refd)

Rama Chandran v The Industrial Court of Malaysia [1997] 1 MLJ 145 (refd)

Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487 (refd)

Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan [1996] 1 MLJ 261 (refd)

Legislation referred to

Evidence Act 1950

Federal Constitution arts 5(1), 8(1)

Police (Conduct and Discipline) (Junior Police Officers and Constables Regulations) 1970 reg 6(3)

Appeal from: Civil Suit No S5–21–331–89 (High Court, Kuala Lumpur)

Ahmad Kamal bin Md Shahid (Attorney General's Chambers) for the appellant.

Karpal Singh (*Karpal Singh & Co*) for the respondents.

Gopal Sri Ram JCA. : The short issue that falls for determination in this appeal is whether the respondent received procedural fairness in the decision making process that led to his dismissal from the police force. The learned judge in the court below resolved the issue in the respondent's favour. His finding is the subject of the appellants' complaint before us.

The respondent was a police officer. Disciplinary proceedings were instituted against him. The specific charge was that he had accepted a bribe from one Shanmugam and had thereby brought the police force into disrepute. The incident had been witnessed by two officers of the Anti Corruption Agency. They were called as witnesses at the inquiry. Shanmugam had died in the meantime. So had another witness by the name of Detective Kamaruddin. The respondent was represented by a police officer throughout the disciplinary proceedings. He was given the opportunity to cross examine the witnesses called in support of the charge.

Shanmugam's statement was not used. Detective Kamaruddin's statement was, however, read out. It is not disputed that the respondent was given an opportunity to traverse Kamaruddin's statement. At the conclusion of the inquiry, the respondent was found guilty and dismissed from the police force.

The learned judge found for the respondent on the sole ground that there had been a breach of the rules governing the orderly room procedure. The relevant rules, to which I will turn to shortly, did not permit the admission of statements of deceased witnesses. According to the learned judge the use to which Detective Kamaruddin's statement was put offended the terms of the relevant disciplinary rules. It was for that reason that he struck down the respondent's dismissal as being void.

I turn now to consider the terms of the rules that were applied to the respondent. They are the Police (Conduct and Discipline) (Junior Police Officers and Constables Regulations) 1970. The relevant rule, the breach of which impressed the learned judge, is reg 6(3). It is in the following terms:

> (a) If the officer pleads not guilty or refuses to plead, the adjudicating authority shall examine the witnesses in support of the charge and their evidence shall be recorded.
>
> Provided that when the evidence of such witness has been previously recorded in writing by a police officer acting in the course of duty, it shall be sufficient if the adjudicating authority reads over the record of such evidence to the witness who shall be required to confirm or, if he so desires, to add to or retract from such evidence. Every such written record so read over to a witness shall, if necessary, be interpreted to the officer and endorsed in the manner required by para (9).

Of this regulation, the learned judge said:

> There is no doubt that the proviso to sub-para (a) of para (3) is not concerned with the admission of statements of persons who are dead. It concerns statements of witnesses who are alive and are giving evidence in the proceedings. What happens is that a witness whose statement has been recorded by the police need not be asked to tell his story afresh. All that needs to be done is to read out the statement to him for him to confirm it. He is then subject to the usual cross-examination.

With this statement, I express my entire agreement.

The learned judge then went on as follows:

> The regulations do not provide for the admission of statements of deceased persons. Regulation 6, which deals with the actual 'trial', provides only for evidence of witnesses examined by the adjudicating authority. So the statement of Detective Kamaruddin was inadmissible evidence. Since it was read out to the plaintiff, it must have been admitted and, being admitted, it must have been considered by the adjudicating authority.
>
> There was therefore a flaw in the decision making process. It was not just a flaw in a matter of procedural form but a flaw affecting the substantive matter of establishing the charge against the plaintiff.

A Once again I find myself in agreement with the view expressed by the learned judge upon the omission in the regulations regarding the admission of statements by deceased witnesses. Where I find myself in dissent is with respect to his conclusion, that the decision making process was fatally flawed.

B Now, it is quite true, as pointed out by the learned judge that the regulations are silent about admitting the statement of a deceased witness. But by concluding implicitly from that premise that the regulations prohibit the admission of such statements is a quantum leap in logical deduction not warranted by the language of the regulations. In effect, what the learned judge was doing was to treat the terms of the regulations as C though they were mandatory provisions of the Evidence Act. But they are not. What the Regulations are designed to do is to provide as best as possible for a fair procedure in the matter of a junior police officer's discipline.

Encik Ahmad Kamal, senior federal counsel who appears for the D appellants, has made two submissions when criticising the learned judge's conclusion. His first is that the strict rules of evidence are not to be applied to a disciplinary inquiry. His second submission is that the real question in a case such as the present is whether at the end of the day, the respondent had what one might objectively call a fair procedure. If he has had fairness, then he has had all that the law requires of the appellants. What E the judge was looking for was evidential backing for the charge as though it were a re-trial before him on the merits of the case. After anxious consideration, I am driven to the conclusion that there is much force in these arguments.

It is, I think, settled beyond argument that procedural and substantive F fairness are constitutionally guaranteed by the Federal Constitution. The cumulative operation of arts 5(1) and 8(1) of the Constitution ensures this.

Now, in the early days of the development of our jurisprudence, our courts adopted a narrow and literal approach to the interpretation of the G Federal Constitution, in particular those provisions which confer fundamental liberties upon our citizens. The decision of the former Federal Court in *Government of Malaysia v Loh Wai Kong* [1979] 2 MLJ 33 is illustrative of this. It was the lowest ebb in the history of our constitutional life. The executive was virtually handed a carte blanche by the courts in the matter of a citizen's fundamental rights. It was one of the darkest moments H in our legal history.

But even in that darkness, there was a flicker of light. It came from the candle lit by the decision of Edgar Joseph Jr J (as he then was) in *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487. It is one of the most important decisions in our time. But the academics did not do it the I justice it truly deserved. They ignored it for some time without realising its far-reaching effects. It gave us a new vocabulary — 'procedural fairness'. We used it in our later decisions with much effect.

We have since jettisoned the narrow approach that hitherto held the field. A number of our decisions have conferred a broad and liberal interpretation upon art 5(1) and 8(1). See *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261; *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481. The latter art in particular has the effect of ensuring fairness in all forms of state action and is of wide sweep. Then came the landmark decision of the present Federal Court in *Rama Chandran v The Industrial Court of Malaysia* [1997] 1 MLJ 145. Edgar Joseph Jr FCJ in a judgment of cardinal importance established that fairness included not only procedural fairness but substantive fairness as well. That decision marks the high level water-mark in our administrative law jurisprudence.

I must now return to the case at hand and apply to it the principles now so well established by our courts. The primary question is whether the respondent received fairness, both procedurally and substantively. Encik Karpal Singh who appears for the respondent has argued that the reading of Kamaruddin's statement into the proceedings, flawed the decision-making process. In support of his argument he has relied on the following observation made by Buttrose J in *Phang Moh Shin v Commissioner of Police & Ors* [1967] 2 MLJ 186 at p 189:

> My attention was drawn to the Indian case of *CS Sharma v State of Uttar Pradesh* AIR 1961 All 45 where it was held that where the statements of witnesses separately recorded previously were read to them and were confirmed by them and these previous statements were then formally brought on record and exhibited the officer concerned was clearly informed of the statements of the witnesses by the record of the previous statements being read over at the inquiry.
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> I have the misfortune to disagree with the views expressed by Nigam J in that case and I am not unmindful, in doing so, that the strict rules of evidence are not applicable to domestic tribunals but on the other hand they must conduct themselves in accordance with the principles of natural justice. Apart altogether from the regulation to which I have just referred it would be wrong, in my view, for the court to countenance an inquiry in which only a cross-examination, without the officer concerned hearing what evidence the witnesses are going to give, is permitted. *It is difficult to see, how, if the witnesses do not give their evidence before the officer conducting the inquiry, he can properly evaluate and appraise the evidence without hearing and seeing them giving it.* The way in which a witness gives his evidence, his demeanour and bearing are important matters to be taken into consideration in determining the weight and value to be attached to his evidence. (Emphasis added.)

In response to this, learned senior federal counsel referred us to *Abdul Raub v The Attorney General* [1983] 1 MLJ 10. It is a decision of the Court of Appeal of Singapore. Counsel read to us the following passage from the judgment of Wee Chong Jin CJ (at p 11 of the report):

> Lastly, it was contended that the admission by ASP Francis Chan at the disciplinary proceedings before him of two written statements were in breach of regs 7(5) and (6) of the Police Regulations 1959, and that such breaches

rendered the proceedings a nullity and the dismissal null and void, as being contrary to the rules of natural justice. We rejected this contention. The wrongful admission of a written statement as evidence is not, in our opinion, per se contrary to the principles of natural justice. In the present case, the appellant had a fair hearing. He was dismissed after he had first been told what was alleged against him and hearing his defence or explanation. We were of the opinion that the written statements were properly admitted in evidence and there was no breach of the procedural provisions of regs 7(5) and (6) of the Police Regulations.

Our attention has been drawn to the provisions in the equipollent Singapore Regulations, which we agree are in pari materia with the Malaysian Regulations under consideration in the present case. The decisions of the Singapore courts on their Regulations are therefore of much persuasive force in proceedings before our courts.

Having given the matter much thought, I am persuaded that the judgment of the Singapore Court of Appeal is to be preferred to that of Buttrose J. True, it is that *Phang*'s case was not referred to in the judgment of the Court of Appeal. It may not have been referred to them by counsel who argued the case. Yet, I am of the view that the opinion expressed by Buttrose J was in very general terms and may have been influenced by the terms of his disagreement with the views expressed in the *Allahabad* case to which he made reference. By contrast, the judgment of the learned Chief Justice is more specific and accords with the views expressed by our own courts.

In the present case, the respondent had the benefit of a full inquiry at which he was represented by an officer. The most material witnesses, namely the ACA officers who witnessed the incident in question gave their evidence in his presence. He was given the opportunity to cross examine them. So far as Kamaruddin's statement was concerned, the reading of it into the proceedings did not produce any procedural unfairness since the respondent was given the opportunity to contradict it. It transpires from the evidence that he did not choose that course.

I must now say a word about substantive fairness in this case. It is clear from the respondent's pleaded case and the arguments presented before the learned judge that the substantive merits of the decision were never challenged. It was not the respondent's case that the decision to dismiss him was unreasonable. His complaint was limited to procedural fairness. No material was therefore placed before the judge by way of evidence to show that the tribunal here had acted unreasonably in arriving at its decision.

For the reasons thus far given, I have come to the conclusion that the learned judge erred in striking down the appellant's decision to dismiss the respondent. In my view, the respondent did, in all the circumstances of the case, receive procedural fairness.

I would therefore allow this appeal, with costs here and in the court below and set aside the orders made by the learned judge. The respondent's suit is dismissed.

My learned brothers Denis Ong and Haidar JJCA, have seen this judgment in draft and have expressed their concurrence with the reasons herein.

Appeal dismissed with costs.

Reported by Wong Ee Lynn